IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 60 OF 1988

Dagadu Sakharam Mohite ...Appellant
Vs.
The State of Maharashtra ...Respondent

Mr. S.L. Maneshinde for the Appellant
Ms.P.H.Kantharia A.P.P. for the State

CORAM: B.H.MARLAPALLE &
ROSHAN DALVI, JJ
RESERVED ON :12TH JANUARY 2006
PRONOUNCED ON :13TH FEBRUARY 2006

J U D G M E N T (Per Smt. Roshan Dalvi, J)

1. The Appellant (accused) was charged with having committed an offence punishable under Section 302 of the Indian Penal Code for having intentionally and knowingly caused the death of one Shyamrao Ganapati Mohite on 2nd September 1985 at about 6.45 p.m. at village Sagaon near Naga Maharaj Math by inflicting a knife blow on his chest. The accused has been convicted of the said offence and sentenced to suffer life imprisonment and to pay a fine of

Rs.500/- and in default to suffer further rigorous imprisonment for 3 months by the Additional Sessions Judge, Sangli under his judgment dated 20th November 1987.

2. His main defence is that he inflicted the said knife blow on the chest of the deceased by way of private defence, he having apprehended that the deceased would deal an axe blow upon him.

3. The parties are known to one another and related, being sons of cousins. They had been neighbors and own adjoining agricultural lands. There were various property disputes between their families for the past 10 to 12 years. Several criminal complaints had been filed against the relatives of the accused by the deceased and/or his relatives. One of the complaints was filed by the brother of the deceased (p.w.2) in respect of a cattle shed set on fire by the family members of the accused. Certain chapter proceedings were also taken out.

4. Almost the entire incident, the time and the place of the incident as well as the parties

present thereat is admitted. The main aspect with which the parties are in dispute is whether or not the deceased himself wielded one blow on the accused and was about to wield another blow before which the accused, in his self defence, dealt him the fatal knife blow.

5. It would be proper to first set out the admissions between the parties to narrow down the dispute between them.

6. The accused was sitting on a plat-form at a bus stop near Naga Maharaj Math in village Sagaon on the road going to village Shirala. The deceased Shyamrao, his brother Baburao (p.w.2), his father Ganapati and his son Nana were returning from the village. The deceased carried an axe and a milk cattle. His brother had a stick in one hand and his father had another stick. The accused, who stated to be an Ayurvedic Doctor, had a knife in his pocket.

7. There has been only one deep injury on the left side of the chest of the deceased. His death has been on account of the deep injury as

per the Medical Officer's report and the P.M. notes. The deceased had no other marks of injury.

8. The accused is stated to have had 7 injuries on his person. Upon being injured he went to Sangli General Hospital alone and got himself admitted at 3.00 a.m., about 8 hours after the incident on next day. The certificate produced by the accused dated 5th September 1985 Exhibit-21 in evidence shows the cause of his injuries to be by hard and blunt object.

9. The accused himself lodged the criminal complaint on 3rd September 1985 and gave a statement to the police, Exhibit-20 in evidence against the complainant and witnesses. His health is shown to be in good condition on 3rd September 1985. A panchanama, Exhibit-22 was prepared in that case showing interalia one sharp battle-axe. The documents Exhibit-20, 21 & 22 have been produced by the accused under a list Exhibit-19. The prosecution of the father and brother of the deceased has ended in their acquittal. The accused has not produced

his medical case papers of the sangli General Hospital.

10. Upon considering these admitted facts and documents, the dispute which lead to the death of the deceased must be evaluated. None other than the accused has admittedly dealt any blow upon the deceased and/or his family members.

11. The prosecution case has been made out by the evidence of mere 5 witness, the panch who made the spot panchanama (p.w.1), the brother of the deceased, one Baburao who was the eye witness and who has deposed about the entire incident (p.w.2), another eye witness who had a paan shop near the place of incident and who has been declared hostile (p.w.3), the Police Constable, who took the deceased to the hospital (p.w.4) and the Investigating Officer (p.w.5). Only evidence of p.w. 2 is material to consider.

12. It is the prosecution case that when the deceased was returning from the farm with his brother, father and son, he carried one axe and

a milk cattle, his brother (p.w.2) having a bundle of fodder on his head and a stick in his hand, his father having another small stick and his son Nana. The deceased was called by the accused who was sitting on a plat-form near the bus stop. Though his brother (p.w.2) thought that the deceased should not approach near the accused, the deceased in fact came close to the accused. The accused hurled abuses upon the deceased and in the scuffle that took place the deceased fell to the ground. The accused dealt him one blow with a knife on the left side of his chest. The brother ran towards the deceased and gave a stick blow on the hand of the accused. The accused took out the knife from the chest of the deceased and ran away towards the West side. His brother and the people who gathered including one Panpattiwala (p.w.3) tried to assuage the wound of the deceased, tried to give him milk, but in vain. They naturally did not chase the accused. This is corroborated by the F.I.R. lodged by P.W.2, the brother of the deceased, who went to a sugar factory and telephoned the police. His evidence has not been in any way shattered in the cross

examination.

13. This case is required to be seen, alongside the defence of the accused that whilst he was sitting at the plat-form near the bus stop on 2nd September 1985 at about 7.00 p.m. the deceased, his brother and father came towards him and dealt an axe blow on the accused. The accused having fallen down saw that the deceased was about to wield another such blow so that he took out a knife, which he carried in his pocket allegedly possessed for self defence, and gave a blow to the deceased which landed on his chest, purely in self defence.

14. The deceased had no marks of injuries any where on his body other than the deep injury of 2.5 cm. x 1 cm. on the left side of his chest by a horizontal incised wound, which caused his death. The P.M. notes Exhibit-25 in evidence shows only the said wound. The Medical Officer's certificate Exhibit-24 in evidence shows hemorrhagic shock due to penetrating injury to heart.

15. The accused on the other hand who admittedly ran away went as far as the Sangli General hospital admittedly by a longer route via Kolhapur as he apprehended that the deceased and his relatives may follow him on the other route towards his village Shirala. He reached Sangli General hospital and got himself admitted and treated purportedly for 7 injuries about 8 hours after the incident. His medical certificate shows he being examined at 3.00 a.m. on 3rd September 1985 for an alleged assault a day before at 7.00 p.m. The 7 injuries described therein are stated to be caused by hard and blunt object. No such hard and blunt object was recovered in the recovery panchanama. In fact the panchama dated 4th September 1985 Exhibit-22 in evidence shows one sharp battle-axe, which the deceased admittedly carried aside from a small bamboo stick which was admittedly carried by the father of the deceased. It is not the case of the accused that the deceased carried any stick. In fact it is his case that he carried an axe and dealt him blow on his head with said axe. The medical certificate Exhibit-21 rules out any

injury with an axe.

16. The right of private defence (RPD) which the accused availed of is in respect of the axe blow on his head allegedly given by the deceased. It has to be seen whether the knife blow is co-mensurate with such axe blow, if any. The injuries caused by the hard and blunt object cannot be taken to have been wielded by the deceased. The axe blow, if any, wielded by the deceased has not manifested itself by way of any particular injury caused by such a weapon.

17. It has been argued on behalf of the accused that the blow of the axe does not necessarily mean the sharp edge of the axe; it could have been by the blunt edge of the axe. That argument does not fit into the injuries stated to be caused by hard and blunt object by the Medical Officer in his certificate Exhibit-21.

18. It would be apt to first understand the parameters of the RPD claimed by the accused, under the circumstances leading to the death of the deceased.

19. Whether or not the accused called the deceased or the deceased himself approached the accused, a scuffle admittedly took place between them. The accused, though an Ayurvedic Doctor, carried a knife in his pocket. Though the deceased carried an axe and is stated to have dealt a blow on the head of the accused, no such injury is reported. It has not been shown by the accused which blow preceded the fatal blow. The accused was in a fit condition to travel for 8 hours to reach the hospital, admit himself, procure the medical certificate and lodge his criminal complaint when he was admittedly in good health on the next day. These circumstances lead to the inescapable conclusion that even if the knife blow was given by the accused after the blow given by the deceased, it was far in access of what was warranted in self defence, even assuming that another such blow was forthcoming.

20. It would have to be seen whether the case of the accused fell within the parameters of his

RPD under Section 96 read with the extent of such right under Section 99 of the Indian Penal Code (IPC). Under Section 96 nothing is an offence if done in exercise of the RPD. Section 99 shows the extent to which RPD may be exercised thus :

> " **Extent to which the right may be exercised –** The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

21. The harm caused by way of 7 injuries upon the accused is far less than that caused by his own fatal blow. In fact the 2 assaults are poles apart. Whereas one has resulted in death, the other has resulted in 7 injuries leaving his health in good condition at the time of recording his statement on the next day.

22. It is further material to see when the right of private defence extends to causing death. Under Section 100 of the Indian Penal Code such right extends to voluntarily causing death or harm to an assailant subject to the afore

stated extent to which right could be exercised upon a reasonable apprehensions that death or grievous hurt would be the consequences of the assault.

23. In this case the injuries have been caused by a blunt and hard object, which admittedly the deceased never carried.

24. The judgment in the case of V. Subramani Vs. State of Tamil Nadu reported in JT 2005(3) SC 82 sets out the ambit of the right of private defence (RPD). It has been held in that judgment in para 11 at page 86 that whether in a particular set of circumstances, a person legitimately acted in the exercise of the RPD is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider the surrounding circumstances. The burden of proof is on the accused who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of

self-defence. In fact the Court is enjoined to presume the absence of circumstances. The accused has to place the necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses of the prosecution or with reference to circumstances transpiring from such evidence. It would be a question of assessing the true effect of the prosecution evidence. The defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehensions by the accused. This burden can be discharged by showing preponderance of probability on the basis of the material on record. Hence, though the accused need not prove RPD beyond reasonable doubt. Yet he is required to show, as in a Civil case, the preponderance of probabilities in his favour.

25. Further in para 12 of that judgment it has been held that the number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a

universal rule that whenever injuries are on the body of accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the RPD. The defence has to further establish that the injuries so caused on the accused probabilise the version of the RIPD. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. It is therefore, held that the plea of RPD cannot be the basis of surmises and speculation. Hence, the entire incident must be examined with care and viewed in its proper setting.....". The accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.

26. Further in the case of Jalaram V. State of Rajasthan reported in JT 2005(10) SC 168 at page 174 it has been held that when the accused could not show the threat such that he could hit the deceased at such place and with such force that he would breathe his last on the

spot itself, he must be taken to have exceeded his RPD.

27. Within this ambit it must be seen whether the accused can place himself. Further it must be seen whether the evidence adduced by the accused by way of medical certificate and his statement before the police both dated 3rd September 1985 as well as the panchanama dated 4th September 1985 produced by the accused under his list of documents Exhibit-19, show by preponderance of probability as in Civil suit that upon being inflicted one axe blow and on his apprehension of another axe blow the accused was constrained to inflict a fatal knife blow upon the chest of the deceased. It can be clearly seen that it was not. The accused therefore, far exceeded his right of RPD going within the realm of the offence of culpable homicide.

28. The accused has been charged with having murdered the deceased. The deceased died almost immediately after the fatal blow inflicted by the accused. The blow was admittedly with a

knife which the accused carried. It caused a deep injury 2.5 cms. X 1 cms. It was the only injury on the deceased. It will have to be seen whether this injury was caused with the intention of causing death or with an intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely to cause death or with the knowledge that it is likely by such act to cause death. The accused is an Ayurvedic Doctor. It is impossible to accept that it was not the intention of the accused to cause such bodily injury to the deceased which was likely to cause his death or that the accused did not have knowledge that by such act he would cause his death.

29. The learned Judge has correctly appreciated the evidence of p.w.2 vis-a-vis the statement of the accused more specially in answer to question 38 in his statement recorded under Section 313 of Cr.P.C. along with the documentary evidence produced by the prosecution as well as the accused. The learned Judge has specifically considered the description of the fatal wound given in Column

No.17 of the P.M. Examination note Exhibit-28 and the fact that the deceased had no other injury on his body. The learned Judge has also considered the sharpness of the knife of the accused inflicting the fatal injury upon the deceased and the intention accompanying it. He has also correctly understood the parameters of the RPD and it is inapplicability in this case. He has also considered how, if the deceased in anger delivered the axe blow on the head of the accused and was going to deliver another such blow, he would have used the sharp side of the axe. He has also considered the stick blow given by p.w.2 on the hand of the accused resulting in injury No.4 shown in the medical certificate of the accused, Exhibit-21, and also the cross examination of p.w. 2 wherein it is shown that he did not notice any other injuries on the person of the accused on his head, forehead and back, but which have been shown in the medical certificate of the accused. The learned Judge has correctly considered who commenced the incident to appreciate whether RPD can be availed of by the accused. He has therefore, correctly concluded that since the

accused has not proved that the deceased commenced the incident by delivering the axe blow on his head and was about to give the second blow, the accused failed to establish his RPD by preponderance of probabilities. The learned Judge has found no infirmity in the prosecution case and accordingly has convicted the accused with offence punishable under Section 302 of the IPC.

30. The only aspect that remains is whether the accused is required to be convicted for offence punishable under Section 302 or under Section 304(II) of the IPC. From the evidence led by the prosecution read with the admissions of the accused in his statement it can be seen that the accused undoubtedly had an intention of causing such bodily injury to the deceased as is likely to cause his death. One severe fatal blow into the heart of the deceased appears ample testimony to such intention.

31. The case of Ravikumar Vs. State of Punjab reported in JT 2005(3) SC 62 was also of a quarrel which ensued between the deceased

and the accused when the accused suddenly picked a `Dhanshu' and gave 2 blows on the head of the deceased. It was held that instead of Section 302, the conviction was appropriate under Section 304(II) of the IPC.

32. The case of Parkashchand Vs. State of Himalchal Pradesh 2004(XI) SCC, 383 was one in which there was a verbal altercation between the deceased and the accused after which the accused brought out a gun and fired a gunshot from a distance of 35 ft. with pallets piercing into the chest of the deceased. It was held that the offence was punishable not under Section 302 but under Section 304(II). That case was of acts done without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. This is a case where the accused was in possession of a knife but the trial Court has not recorded a finding that the assault on the deceased was premeditated. In fact, there is no evidence in this regard. On the other hand, the evidence proved that the party of the deceased consisted of four members, the deceased was armed with an axe, P.W.2 was armed with a

stick and the father of the deceased was also armed with a stick. The accused sustained injuries which could be caused by a hard and blunt object. It could be reasonably gathered that the injuries received by the accused could be attributed to the sticks and in any case P.W.2 has admitted that he had given a blow or two with the stick on his hand during the incident though it is not clearly established whether the p.w.2 assaulted the accused before or after the accused inflicted the knife blow on the deceased. It has also come in the evidence that the accused was practicing at Shirala village and he used to leave his village Sagaon to go to Shirala in the evening by bus and would return in the night. The party of the deceased had left the bureaucrat on the main road and the incident had taken place a few yards away from the spot where the accused was waiting for the bus i.e. At the Katta/platform of Naga Maharaj Math. The accused, being a Medical Practitioner (Ayurveda), it could be at the most believed that he had the knowledge that the injury he was causing to the deceased could result in his death and the view taken by the

trial court that he inflicted the knife blow by selecting a particular spot and, therefore, the blow was given with an intention to kill the deceased would be unsafe to accept.

33. The case of Shankar Narayan Bhadolkar Vs. State of Maharashtra reported in AIR 2004 SC 1966 shows that the accused loaded a gun and shot from close range of 4 to 5 ft. aimed at the chest of the deceased. It was his plea that he had invited about 40 persons for dinner including the deceased who was heavily drunk and unable to control himself. He was dissuaded from returning from his place but which was not heeded by the deceased. Hence to scare him the accused picked up a gun lying there. The deceased tried to snatch it when it accidentally got fired.

34. Considering the prosecution evidence as well as a Ballistic report it was held that, that was not a case of negligence under Section 304 (A) of the IPC or an accident under Section 80 of the IPC but was a case of culpable homicide not amounting to murder punishable under Section

304(II) of the IPC.

35. In that judgment the distinction between murder and culpable homicide not amounting to murder has been set out in para 24 at page 1972 with regard to the intention and the knowledge on the part of the accused. Though there may not be any intention of causing death on the part of the accused in this case or even an intention of causing injury which he knows would cause death or which is sufficient to cause death, he certainly had the intention of causing injury likely to cause death. Similarly though he may not have had a knowledge that the act was so imminently dangerous as would cause death, he knew it was an act likely to cause death.

36. In the case of Jalaram Vs. State of Rajasthan reported in JT 2005 (10) SC 168, the conviction under Section 302 was changed to Section 304(I). That was a case of tresspass by the accused on the land of the deceased, when the accused gave one blow upon the deceased with a stick which resulted in fatality but in

which no grudge against the deceased or motive on the part of the accused was seen. The fight was held to have been without pre-meditation. Hence mens rea was not seen. The fights of the nature and the force with which the blow was inflicted on the forehead of the deceased was taken into account. Under those circumstances, offence under section 304(I) and not under Section 302 was held to have been made out and sentence of 10 years rigorous imprisonment was held to be just.

37. In the case of Devappa Keshav Nayak Vs. State of Maharashtra reported in 2004 ALL MR (Cri.) 1852 DB, a husband hit his wife with a wooden plank during one of the usual fights between the spouses. He himself took her to the hospital as also a Neuro Surgeon. She expired. It was held that there was no evidence to show that he intended to kill his wife. All that was apparent was that he intended to hurt her. Though he did not intend to kill her, he had knowledge that death is likely to be caused by the blow that he gave on her head. In that case earlier conviction under Section 302 was altered

to the one under Section 304 (II) of the Indian Penal Code.

38. The evidence in this case is sufficient to impute the aforesaid knowledge that the act of the accused was likely to cause the death of the deceased. That act was in one fatal blow. That was without any such similar blow upon the accused. The case of culpable homicide not amounting to murder is therefore, made out by the prosecution. The case of RPD of the accused has to be totally rejected. The findings of fact of the learned Additional Sessions Judge, Sangli in the impugned judgment are confirmed. However, the conclusion of the learned Judge by the application of Section 302 to the case of the accused requires to be modified. The conviction deserves to be made under Section 304(II) of the IPC and not under Section 302 of the IPC as held by the learned Additional Sessions Judge, Sangli by following the law laid down in the case of Sukhdev Singh Vs. Delhi State reported in (2003) 7 SCC 441. The conviction is accordingly altered. Custodial sentence of 8 years would meet ends of justice. The accused shall undergo Rigorous Imprisonment to that extent. The rest of the

sentence remains unaltered.

38. The Appeal is therefore allowed only to this limited extent. Bail stands cancelled and the accused to surrender to the Sessions Court concerned so as to suffer the sentence. Sessions Court concerned to send the compliance report within two weeks.

(ROSHAN DALVI, J.) (B.H.MARLAPALLE, J.)